U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 June 2008

CASE No.: 2005-DBA-00014

In the Matter of:

Disputes concerning the payment
Of prevailing wage rates and
Overtime pay by:

PYTHAGORAS GENERAL CONTRACTING
CORP.; STANLEY PETSAGOURAKIS, Owner

Proposed debarment for Labor
Standards violations by;

PYTHAGORAS GENERAL CONTRACTING
CORP.; STANLEY PETSAGOURAKIS, Owner

With respect to Laborers and Mechanics
Employed by the Contractor on:

Contract No. DC-9800015
(Jobsite: Vladeck Houses, New York,
New York)

Appearances

Susan B. Jacobs, Esq.
Stacy M. Goldberg, Esq.
For the Complainant

Chris Georgoulis, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by the issuance of an Order of Reference dated June 29, 2005, by the Administrator, Wage and Hour Division, United States Department of Labor (Administrator), asserting the failure to pay prevailing wage rates and fringe benefits and seeking debarment of Pythagoras General Contracting and Stanley Petsagourakis (collectively

"Respondents"). The Order of Reference alleges that Pythagoras General Contracting (Pythagoras) and owner Stanley Petsagourakis disregarded their obligations to their employees under the Davis-Bacon Act (DBA), 40 U.S.C. 276(a) *et seq*, and committed aggravated or willful violations of the labor standards provisions of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327 *et seq*, during the remodeling of residential buildings, known as Vladeck Houses, in New York, New York.

Respondents deny the Administrator's allegations. Hearings were held on February 6-9, March 20, June 5-8, and 11-12, 2007 in New York, New York. Respondents submitted a post-hearing brief on January 4, 2008, and the Administrator submitted a post-hearing brief on January 11, 2008. Based on the record made at the hearing, the following is entered:

FINDINGS OF FACT

Respondents entered into a federally funded contract, number DC-9800015, with the New York City Housing Authority (NYCHA) on June 20, 2000, for the renovation of the interior and exterior of residential buildings, Vladeck Houses, located on Madison Street in lower Manhattan ("the contract"). The work to be performed under the contract generally consisted of renovating bathrooms and kitchens, performing lead abatement, and completing exterior masonry and roofing work. The contract was valued at $23,414,572.96. Under the terms of the contract, Respondents were authorized to begin construction in March of 2001. (RX P).

Incorporated into the contract was General Decision Number NY990003, which required the payment of certain prevailing wage rates and fringe benefits as follows:

Carpenters

Hourly rate:	$30.06
Fringe Benefits:	$18.47
TOTAL:	$48.53

Mason Tenders

Hourly rate:	$24.00
Fringe Benefits:	$12.19
TOTAL:	$36.19

Plasterers

Hourly rate:	$27.91
Fringe Benefits:	$15.55
TOTAL:	$43.46

Bricklayers

Hourly rate:	$31.77
Fringe Benefits:	$15.46
TOTAL:	$47.23

Painters

Hourly rate:	$27.25
Fringe Benefits:	$12.91
TOTAL:	$40.16

Tile Layers

Hourly rate:	$31.26
Fringe Benefits:	$14.82
TOTAL:	$46.08

Tier B Laborers

Hourly rate:	$14.00
Fringe Benefits:	$6.00
TOTAL:	$20.00

The Department of Labor's Wage and Hour Division, Brooklyn District Office, began an investigation in September of 2002. Wage and Hour commenced its investigation after receiving several complaints from Pythagoras employees that they were not being paid overtime wages. (Tr. 589). The investigation was conducted by Peter Zhu (investigator Zhu), who received certified payroll records, home payroll records, contract documents, and daily "Look Aheads" from Pythagoras.[1] (EXH A-8, A-9; Tr. 603-04). Investigator Zhu interviewed approximately thirty (30) Pythagoras employees in person, over the phone, or by mail-in questionnaire and visited the construction site. (Tr. 622, 956). The investigation resulted in a determination that Respondents violated the Davis-Bacon Act. The alleged violations, totaling $948,491.28, include the failure to pay for all hours worked and the failure to pay prevailing wages, fringe benefits, and overtime wages.

DISCUSSION

The Administrative Review Board (ARB or the Board) discussed the parties' burdens in a case involving unpaid wages under the Davis Bacon Act in *Thomas & Sons Building*

1. The Daily Look Aheads are documents listing the type of work that is to be performed in an apartment on a specified date.

Contractors, Inc., 1996-DBA-37, ARB Case No. 00-050 (ARB August 27, 2001). The ARB referred to the United States Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946), as delineating the parties' respective burdens of proof. The ARB reasoned that, under *Mt. Clemens*, the Administrator has the initial burden of establishing that the employees performed work for which they were improperly compensated. The ARB quoted *Mt. Clemens* in holding that "[t]he Administrator has carried his burden if he proves that the employees have in fact performed work for which they were improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *Ray Wilson Co.***,** ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004) (Respondent has the burden to rebut Department's proof of extent and amount of violations). If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Thomas & Sons Building Contractors, supra, at 6.*

Failure to Pay for All Hours Worked

Administrator claims that Respondents are liable for the payment of back wages for eighty (80) employees because of the failure to pay employees for all the hours that they worked.[2] In assessing the amount of wages due, Administrator has relied upon hearing testimony and employees' statements to investigator Zhu. Administrator alleges that such reliance is proper as Respondents, in violation of 29 C.F.R. §5.5(a)(3)(1), have failed to maintain accurate payroll records, and, therefore, the employees' testimony is the most reliable method of reconstructing the number of hours worked. Respondents, on the other hand, argue that the Administrator has failed to meet her burden of proof, and has not demonstrated that Pythagoras employees were improperly compensated for their time. Respondents argue that the testimony relied on by Administrator is not credible and fails to establish a pattern or practice of underpayment.

29 C.F.R. §5.5(a)(3)(i) requires that payrolls and basic records be maintained by the contractor during the course of the work and for a period of three years thereafter. The payrolls must contain the name, address, and social security number of each worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits …), daily and weekly number of hours worked, deductions made and actual wages paid. 29 C.F.R. § 5.5(a)(3)(i). 29 C.F.R. §5.5(a)(3)(ii)(B)(3) also requires that each payroll be accompanied by a signed statement of compliance certifying the payment of the proper prevailing wage and fringe benefits.

Where these requirements are not met, the Administrative Law Judge (ALJ) can rely on the testimony of witnesses to assess and reconstruct the hours worked. See, *Star Brite Construction Co.*, ARB Case No. 98-113, 1997-DBA-12 (ARB, June 30, 2000); *Ray Wilson Co.*, ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004)(the Board upheld the ALJ's use of testimony by workers "in the absence of accurate employer records" from either the contractor or

2. Administrator initially sought back wages for 84 employees, but is no longer seeking back wages for 4 employees (Manuel Burgess, Hector Cintron, Roberto Henriquez, and Jorge Salvatierra) based on a lack of evidence. See, Administrator's Brief at 82.

the subcontractor). In the instant case, both employees and management testified with regard to the time keeping method(s) utilized by Respondents. The testimony, in addition to the documents produced, unequivocally establishes that Respondents failed to meet the aforementioned regulatory requirements by not maintaining accurate records of the hours worked.

Fernando Calzolaio, the project manager, testified that each assistant superintendant tracked the hours worked by the members of their crew(s). (TR pp. 1749, 1752, 1835, 1857). The employee testimony regarding the manner in which the assistant superintendants kept track of the start and quit times varied. Some employees testified that they signed in every day, other employees testified that they never signed in, and yet still others testified that the supervisor would have a list and would check off an employee's name as he reported for work. Each assistant superintendant would then turn in their record of the hours worked to Frank Louisdor, the general superintendant. (TR pp. 1749, 1752, 1835, 1857). Calzolaio testified that, once a week, Lousidor would send this information to the office. (TR p. 1750). The information that Lousidor sent to the office did not contain start and quit times for each employee; it merely listed the daily number of hours worked. (TR p. 1782). Thereafter, the bookkeeper would transfer the information onto a Paychex form and submit it to the payroll company for processing. (TR p. 1750). When the payroll came back to Pythagoras, weekly paychecks were distributed to employees, and the bookkeeper would transfer the Paychex information to the certified payroll. (TR pp. 1750-51, A-7). The certified payroll contained the name of the employee, trade category, gross wages, net deductions, hours worked, and net pay. (TR pp. 1750-51, A-7). Pythagoras did not keep copies of the time sheets after said information was transferred to the certified payroll. (TR p. 1782, 1858).

Thus, Respondents failed to meet the regulatory requirements. The certified payrolls submitted by Pythagoras are not complete as they do not contain the daily and weekly hours worked for each employee. Because Pythagoras discarded all of its records, it cannot produce any documents detailing when employees began work in the morning or quit for the evening. Moreover, the certified payrolls do not cover the entire project as no records were produced after December of 2002. As the documentation produced by Respondents is incomplete and unreliable, testimony can be used to assess the hours worked.

Administrator's allegations that Respondents failed to pay its employees for all hours worked centers around the time that the employees commenced work each morning. Administrator argues that the employees began work at 7:30 a.m., as opposed to 8:00 a.m., yet were not compensated for this half hour of work. Respondents, on the other hand, maintain that, by contract, they could not perform work in the buildings until 8:00 a.m., when the NYCHA unlocked the building(s). Respondents further claim that work could not begin until 8:00 a.m. because the apartments were occupied and they had to wait until the tenants left the premises. Both parties have presented evidence in support of their position.

The employee testimony regarding the time that they arrived in the morning to start work varied as to the exact time of arrival, but uniformly established that the majority of employees arrived prior to 8:00 a.m. Patrick Richards, Delroy Green, Filbert Franklin, Edward Riley, Clinton Orridge, Lindal Pratt, Thomas Justiniano, and Raymond Garcia Jr. all testified that they were required to report to work at 7:30. (TR pp. 15-16, 60, 85, 136, 157, 327, 781, 805-06, 809).

Numerous other employees indicated that they reported to work at 7:30 in their signed statements to investigator Zhu. These employees include Clive Hall, Marvin Woodard, Jose Rivera, and Juan Hernandez. (EXH R-NNN, EXH A-32, EXH A-31, EXH R-FFFF, R-GGGG, R-HHHH). Juan Hernandez explained that even when he signed in at 7:30, his time sheet would reflect 8:00. (EXH R-FFFF, R-GGGG, R-HHHH). Riley testified that it was Stanley Petsagourakis' brother, Nick Petsagourakis, who told him to report at 7:30 to get his equipment, but that he was not allowed to actually sign in until 8:00 a.m. (TR p. 157, 159).

Other employees testified that they reported to work even earlier. Jesus Hernandez, Jude Merzy, and Eric Quinnones testified that they reported to work at 7:00. (TR p. 224, 421, EXH R-IIII, EXH R-JJJJ). Fabio Arbelaez testified that he reported to work at 7:45, except during the summer when he reported at 7:00. (TR p. 257). Raymond Jesse Garcia testified that he reported to work between 7:50 and 8:00 a.m., and Michael Pagan testified that he was required to report at 7:45. (TR pp. 187-188, 365-366). Jamie Velez testified that he could not remember precisely when he started work, but believed that it was somewhere between 7:30 and 8:30 a.m. (TR p. 291). Steven Washington also estimated that he arrived at work between 7:00 and 8:00. (TR pp. 383-84). Only Gregory Kavalos, Baffour Agyemang, and the janitorial employees, Tereza Ubinas, Jasline Francois, and Marie Paul, stated that they were not required to report to work until 8:00. (TR pp. 111-12, 167-168, EXH R-HHH, EXH A-30, AXH A-33).

The employee testimony generally affirmed the provision in the contractual agreement that work was not permitted to begin *in* the apartments until 8:00 a.m. [Emphasis added]. Richards, Green, Franklin, Gregory Kavalos, Ubinas, Raymond Garcia Jr., Pratt, Merzy, Arbelaez and Washington all testified that they did not begin work in the apartments until 8:00 a.m., as per the terms of the contract. (TR pp. 15-16, 60, 85, 327, 421). Several employees, however, testified that they entered the buildings and commenced work prior to 8:00. For example, Riley testified that he arrived at work at 7:30 and thereafter entered the apartments. (TR p. 136, 157). Similarly, Jesus Hernandez testified that he arrived at work at 7:00 and entered the apartments at that time in order to begin plastering. (TR p. 238). Orridge also testified that he began to work as soon as he arrived at the construction site at 7:30. (TR p. 503).

The testimony was consistent regarding what the employees did between the time that they arrived for work and the time that they were permitted to enter the buildings. Except for the employees who claimed that they immediately entered the buildings to begin work, the employees generally testified that they gathered materials and tools and waited to be let into the apartments.[3] (TR pp. 15-16, 60, 86, 157, 159, 328, 383, 422). Tools and supplies were generally

3. Respondents have not disputed that time spent gathering tools and receiving instruction is compensable under the Davis Bacon Act. Case law clearly establishes that activities performed prior to or after the regular work shift are compensable under the portal-to-portal provisions of the Fair Labor Standards Act provided that those activities are an integral and indispensible part of the principle activities for which covered workmen are employed. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 33-34 (2005); *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956); *In the Matter of: Tele-Sentry Security Systems, Inc*., 1987 WL 247062 (September 11, 1987)(ALJ held that the thirty minutes employees spent gathering tools, receiving instructions, and loading supplies fell within the meaning of *Steiner* and was compensable). It is determined that the time Pythagoras employees spent gathering tools and supplies and receiving daily instructions is an integral and indispensible part of the principle activity, and, therefore, these actions are compensable.

kept in locked "sheds" or "containers," located outside of the buildings. Arbelaez and Nick Petsagourakis testified that they kept the keys to the sheds. (TR pp. 1886-87, 257).

In order to determine the back wages due, investigator Zhu and the Administrator had to reconstruct the hours worked and make reasonable inferences based on the information available. It is determined that the credible testimony of Pythagoras employees establishes that the employees arrived prior to 8:00, and have, therefore, performed work for which they were not compensated. Such a conclusion is a matter of just and reasonable inference based upon the testimony of the employees. The testimony of the employees who stated that they entered the buildings and began to work prior to 8:00 is not credible. However, there is sufficient credible testimony to believe that employees were required to report to work prior to the time when they were able to enter the buildings, and that the employees used this time to gather their tools and supplies and receive their work assignments for the day. Thus, Administrator has met her burden and proved the amount and extent of the work as a matter of just and reasonable inference.

As Administrator has met her burden, the burden shifts to Respondents to present evidence of the precise amount of work performed or to present evidence to negative the reasonableness of the inference to be drawn from the employees' evidence. The Respondent has the burden of coming forward with evidence of the precise amount of work performed by each employee "at the risk of a judgment for the amount shown." *Wirtz v. Lieb*, 366 F.2d 412, 415 (10th Cir. 1966). Where no record is kept of the actual number of hours worked, respondent's burden is to "disprove" evidence that the Act was violated. *Shultz v. Hinojosa*, 432 F.2d 259, 261 (5th Cir. 1970); *Skipper v. Superior Dairies, Inc*., 512 F.2d 409, 420 (5th Cir. 1975). *Mt. Clemens Pottery* provides specific guidance on the responsibilities of the trier of fact: Unless the employer can provide an accurate estimate of the hours worked, it is the duty of the fact finder to draw whatever reasonable inferences can be drawn from the employees' evidence. *Mt. Clemens*, 328 U.S. at 687. As noted above, Respondents failed to keep time records detailing the start and quit times of the employees and, as such, cannot prove the exact time that the employees worked. Respondents, therefore, attempt to prove that the Act was not violated on the grounds that no work could begin prior to 8 a.m.

The testimony of Respondents' witnesses establishes that the "working hours" were from 8:00 to 4:00. Calzolaio, the project manager, testified that the start time was 8:00. (TR p. 1740, 1803). Joseph Borelli, an assistant superintendant for the NYCHA, stated that Pythagoras employees were only authorized to begin work at 8:00, when the buildings were unlocked. (TR p. 1811). Borelli testified that he arrived at the work site between 7:45 and 8:00, and that "at times" there were already employees there, but that there was no access to the apartments. (TR p. 1816). Louisdor, lead superintendent at Vladeck, testified that the workday started at 8:00, and he explained that no employees could start before this time because "the things they need to do the work, they have to get it at 8:00." (TR p. 1832). Nick Petsagourakis testified that employees were required to report at 8:00, and that, generally, the employees arrived between 8:00 and 8:10. (TR p. 1887). Stanley Petsagourakis, the president and manager of Pythagoras, testified that he came in early to see what was happening in the mornings. (TR p. 1938). He testified that he saw people arrive between 7:30 and 8:15, but that no work commenced until 8:00. (TR pp. 1938-39).

The testimony presented by Respondents is not sufficient to refute the inference drawn from the employees' testimony - that the employees were required to arrive early and prepare for work. The testimony presented by Respondents establishes that, consistent with the terms of the contract, employees were not permitted to work *in* the buildings until 8:00. [Emphasis added]. This testimony also confirms the unreliability of the statements of those witnesses who testified that they worked in the buildings prior to 8:00. However, the testimony of Respondents' witnesses does not refute the testimony of all the employees. None of Respondents' witnesses address the possibility that employees were required to get to work early and be prepared to start working in the buildings at 8:00. The testimony in question only establishes that the actual work on and in the buildings started at 8:00; it does nothing to refute the allegations that employees started their workday prior to entering the building(s).

Furthermore, the testimony of Respondents' witnesses establishes that Pythagoras employees were at the worksite prior to 8:00. Both Borelli and Stanley Petsagourakis testified that they saw people at the worksite before 8:00, some at 7:30. Nick Petsagourakis, who arrived between 7:00 and 7:30, claimed that no one else arrived at the site until 8:00. This testimony is not credible, as it is contradicted by both the employees' testimony and that of Borelli and Stanley Petsagourakis.[4] Those individuals who saw employees at the site prior to 8:00 did not testify as to how the employees used this time or what they were doing. Thus, there has been no attempt by Respondents to refute the employees' testimony that this time was used to gather tools and supplies and prepare for work. The only testimony that attempts to refute said allegations is that of Louisdor, who testified that the tools and supplies that the employees needed to perform the work were not accessible to them prior to 8:00. This testimony is not credible. In the first instance, the testimony of numerous employees has established that all the supplies were kept in the sheds and containers in the yard, access to which was available prior to 8:00, as there were no restrictions on when employees could pick up their supplies. (TR pp. 1789-90, 1901-02, 1938-39). Furthermore, neither of the individuals who actually opened the sheds testified that they waited till 8:00 to let the workers get their supplies. It is implausible that Nick Petsagourakis and Arbeleaz, who arrived early, would wait to open the sheds, thereby delaying the start of the workday past 8:00, when they could open the sheds before hand, such that the employees were prepared to start, meaning they had their tools, supplies, and work assignments, at 8:00 or before. (TR pp. 1886-87, 257).

Thus, it is determined that Administrator has met her burden to show that the employees performed work for which they were not properly compensated. The Respondents have not presented evidence sufficient to negate the reasonableness of that inference. As such, Respondents have not met their burden to rebut Administrator's proof of the extent and amount of violations. The employees are, therefore, entitled to compensation for the extra half hour that they worked each morning.

It is permissible to award back pay to non-testifying employees based upon the representative testimony of a small number of employees. See, *Donovan v. New Floridian Hotel, Inc*., 676 F.2d 468 (11th Cir. 1982). In the instant case, it is determined that there is sufficient credible testimony to believe that the employees alleged by the Administrator started their

4. Calzolaio and Louisdor did not testify as to whether there were employees on the site prior to the 8:00 start time.

workday prior to 8:00. In addition to the employees who testified or gave a statement to investigator Zhu, Administrator alleges that there is a group of 41 employees who worked as Tier B laborers who are also due back wages based on the additional half hour of work per day. Investigator Zhu calculated these wages by multiplying the 7 ½ reconstructed hours per day by the number of days worked in each workweek, as shown on the Pythagoras certified payroll records. (EXH A-8, A-9, TR p. 955). Investigator Zhu multiplied the total number of reconstructed hours by the prevailing wage rate to determine the total prevailing wages due for the week. (TR p. 955). Investigator Zhu then subtracted the gross wages paid from the total prevailing wages due for the week. (TR p. 955). The total back due wages, for the 41 Tier B laborers, is $70,556.88. (Supplemental Exhibits A-34a, A-35a).

Improper Payroll Classifications

Administrator argues that Respondents failed to pay twenty-seven (27) employees the proper prevailing wages by misclassifying said employees as "Tier B" laborers without regard to the actual work performed. Administrator bases her argument on the testimony presented by the employees regarding the nature of their employment. Respondents dispute this allegation, arguing that investigator Zhu relied solely on the inconsistent statements of employees without any knowledge of the actual scope of the project. Respondents rely on the assessments of Constantino Sagonas, the Assistant Deputy General Manager of Capital Projects and Development for NYCHA. Sagonas conducted an analysis of the amount of each type of skilled labor required on the project and found that it was much less than the extent of the work the employees alleged they performed.

Under the DBA and related Acts, contractors working on federal construction projects are required to pay locally prevailing wage rates as determined by the Secretary of Labor. 40 U.S.C. §3142(b). While an ALJ is without discretion to adjudicate the propriety of a prevailing wage determination, an ALJ may determine whether an employee is properly classified for purposes of determining the appropriate prevailing wage rate. 29 C.F.R. §§ 1.8 and 1.9 (2000); *Dumarc Corp.***,** Case No. 2005-DBA-7 (ALJ, Apr. 27, 2006). An ALJ may also properly consider area collective bargaining agreements in determining whether employees have been misclassified. *Actus Corp.*, 1996-DBA-1 (ALJ, Jan. 29, 1999).

Both the Department's regulations and Board precedent require that employees be classified and paid according to the work they perform, without regard to their level of skill. 29 C.F.R. 5.5(a)(1); *Fry Brothers Corporation*, WAB Case No. 76-06 (June 14, 1977). Thus, a "worker's classification depends upon the tasks he performs and the tools he uses." *Dumarc Corp.***,** Case No. 2005-DBA-7. The Wage Appeals Board has noted that it is "incumbent upon the employer who utilizes employees in more than one classification to ensure that those employees are properly paid for the various types of work…performed and for the hours such work was performed." *P & N, Inc./Thermodyn Mechanical Contractors, Inc., et al.*, ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996). See also, *Permis Construction Corp.*, WAB Case Nos. 87-55, 87-56 (Feb. 26, 1991). Where an employer's records are inaccurate or incomplete, employees are not to be penalized by denying them back wages simply because they cannot prove the precise amount of uncompensated work. An employer who fails to keep

adequate records cannot dispute a back wage award on the ground that the amount of wages due cannot be precisely determined.

The record clearly supports the conclusion that Respondents misclassified certain employees and failed to segregate the hours spent performing different jobs. Stanley Petsagourakis, owner of Pythagoras, and Calzolaio, project manager, testified that the general superintendant, Louisdor, had the responsibility of classifying workers for the certified payroll records. (TR p. 1750, 1781, 1783-84, 1859; Exh A-39, pp. 31-32). Louisdor testified, however, that he failed to reclassify an employee when he performed work in another job classification, and he failed to segregate the hours employees spent in different job categories. (TR p. 1863).

Carpenters

Administrator alleges that three employees, Patrick Richards, Clive (Ozzie) Hall, and Gregory Kavalos, were all classified as Tier B Laborers when they actually performed carpentry work. Richards testified that he was hired by Louisdor to do carpentry work on the Vladeck project. (TR p. 12, 48). Richards stated that he worked in the kitchens removing and re-installing the cabinets and in the bathrooms putting in molding. (TR pp. 28-30). Richards also testified to installing bathroom accessories such as the tooth brush holder, towel rack, soap dish, and toilet paper holder. (TR pp. 28-30). Richards testified that he worked with Hall and Mannie Kavalos, who also performed carpentry work. (TR pp. 15-16, 19). Richards stated that he recommended Hall to Stanley Petsagourakis on his request for the name of a good carpenter. (TR p. 49).

Louisdor testified that when he hired Richards, he informed him that he did not currently have any carpentry work, and so he would be hired to perform Tier B labor. (TR p. 1840). Louisdor added that when carpentry work became available, he would give it to Richards. (TR p. 1840). Louisdor confirmed that Richards installed bathroom and kitchen accessories, but stated that such was the extent of his carpentry work. (TR p. 1841). Lousidor also confirmed that Richards and Hall worked as a team doing carpentry work. (TR p. 1842). Even though Richards did carpentry work, he was never paid the higher rate; Louisdor stated, "when he start[ed] doing the carpentry, I never reclassified him as a carpenter." (TR p. 1863). Louisdor testified that the same was true of Hall. (TR p. 1863). Louisdor unequivocally stated that he did not keep track of the time employees spent performing different tasks. (TR p. 1863).

Investigator Zhu explained that he calculated the back wages due to Richards by multiplying 7 ½ reconstructed hours per day by the number of days in each workweek shown on the Pythagoras certified payroll sheets for a weekly total of 37.5 hours. (Exhs A-8, A-9, TR p. 656-60). Investigator Zhu then multiplied the total number of hours reconstructed by the prevailing wage rate for carpenters, $48.53, to determine the total prevailing wages due for the week. Investigator Zhu then subtracted the gross wages paid, as shown on the certified payroll, from the total prevailing wages due for the week.[5] Investigator Zhu determined that a total of $116,947.31 is due to Richards in back wages. (Exh A-34, Supplemental Exhibit A-35a).

5. Investigator Zhu used this same basic method of computation for each employee that he calculated back wages for. Since the formula is the same for each employee, it will not be reiterated each time.

Respondents do not dispute that Richards performed carpentry work. Rather, they dispute investigator Zhu's calculations as to the amount of time spent doing carpentry work, and therefore, the amount of compensation due. Respondents claim that Richard's testimony regarding his time spent performing carpentry work is not credible. According to Respondents, if Richards' testimony is to be believed, it would mean that he performed work on over 3,000 bathrooms, over 3 times the number of bathrooms to be renovated under the contract. Richards' testimony also indicates that he engaged in carpentry work on days when the Daily Look Aheads reveal that no such work was performed. According to Respondents, Richards is entitled to compensation for 118 days of work performed as a carpenter. Pythagoras calculated this amount based on their determination that every bathroom required a half hour of carpentry work, a review of the records, and knowledge of the scope of the project. (Resp. Ex 00).

Administrator has met her burden to show that Richards performed work for which he was not fully compensated. Administrator has shown the amount and extent of the work as a matter of just and reasonable inference. Respondents have presented evidence to negate the reasonableness of the inference that Richards spent all of his time performing carpentry work by questioning the accuracy and credibility of his statements. Respondents have also presented testimony from Louisdor who stated that Richards was initially hired as a Tier B laborer and would be given carpentry work only when it was available. Respondents assert that Richards is entitled to compensation for 118 days as a carpenter based on a review of their records and knowledge of the scope of the project. I find that Respondents have presented sufficient evidence to negate the reasonableness of the conclusion that Richards is entitled to compensation for all of his time at the carpentry rate. Rather, it is determined that Respondents' assessment, that Richards is entitled to 118 days of work as a carpenter, is more credible and reliable. Richards is owed a total of $42,949.05 in back wages.[6]

In an interview statement taken over the phone, Hall stated that he worked at Vladeck as a carpenter installing doors, kitchen cabinets, door locks, and tiling the bathrooms. (Exh. R-NNN). Richards, Stanley Petsagourakis, Louisdor, and James Carrion all testified that Hall performed carpentry work. (TR p. 15, 22, 49, 1554-57, 1839-42, 1861-63, 1948-49, 1957-58, 1969).

Following the same method that was described for Richards, investigator Zhu determined that Hall is entitled to compensation exclusively at the carpentry rate and is owed a total of $75,031.63 in back wages. (Exh A-34, Supplemental Exhibit A-35a). Respondents do not dispute that Hall is entitled to compensation as a carpenter; they only dispute that Hall is entitled to compensation for all of the time he worked at Vladeck at the rate for carpenters. Respondents point to the fact that the carpentry work required by the project was not of such an extent that Hall would have been required to perform carpentry work each day. Like Richards, Respondents claim that Hall is entitled to compensation for 118 days at the carpentry rate.

Administrator has met her burden to prove that Hall performed carpentry work for which he was not properly compensated. Administrator has shown the amount and extent of this work as a matter of just and reasonable inference. Respondents, based on a knowledge of the work

6. 118 days at 7.5 hours a day is a total of 885 hours. 885 hours multiplied by the carpentry rate of $48.53 yields a total of $42,949.05.

required, have presented sufficient evidence to negate the reasonableness of that inference. Furthermore, the testimony establishes that Richards and Hall worked together as a team, and, as such, they are entitled to compensation for the same amount of time. It is determined that Respondents' assessment of the amount of time that Hall worked as a carpenter, based on a review of the records and a detailed knowledge of the scope of the work on the project, is more credible and accurate. Thus, Hall is entitled to 118 days of compensation as a carpenter. Hall is owed a total of $42,949.05 in back wages.

Gregory Kavalos testified that he worked on the Vladeck housing project with his father Manni Kavalos, who was a former partner of Stanley Petsagourakis. (TR pp. 109, 116-17). Gregory Kavalos was 19 at the time he was hired by Stanley Petsagourakis. (TR p. 117). Gregory Kavalos was classified as a Tier B Laborer. (Exhs A-8, A-9). Both Gregory and his father worked as a team building soffits in the bathrooms, enclosing pipes in the upstairs apartments, doing tile work in the bathrooms, and installing bathroom doors. (TR 110-11, 114, 118-19). Soffit work, which took between one hour and one hour and twenty minutes to complete, required using metal studs to frame the structure, installing a cement board around it, and then screwing it in. (TR pp. 110-11). Generally, Gregory and his father worked on four bathrooms per day. (TR p. 123, 126). They also built steel enclosures around the bulkheads on the roof. (TR p. 110-11). To complete their work, both used drywall guns, saws, and grinders. (TR p. 111).

Calzolaio and Lousidor both testified that Gregory and Manni Kavalos built all of the soffits and built the temporary sheds on the roof. (TR p. 1773, 1792-95, 1864). Richards and Velez confirmed that they saw both Gregory and Manni performing carpentry work. (TR pp. 19-20, 309-10). Calzolaio testified that soffit work was performed every day. (TR p. 1734, 1736, 1773, 1792-93, Exh A-21).

Investigator Zhu calculated the back wages for Gregory Kavalos at a blended rate of 30% of the rate for carpentry and 70% of the Tier B rate for a total hourly wage of $28.56. (Exhs A-8, A-9). Investigator Zhu concluded that a total of $48,196.80 is due in back wages to Gregory Kavalos. Respondents dispute that Gregory Kavalos worked as a carpenter on the project. Respondents point to the fact that Gregory was only 19 at the time he was hired. Respondents allege that his lack of prior experience means that he was only hired as a laborer. Respondents also attempt to discredit his testimony by identifying several inconsistencies between his testimony and the actual work performed on the buildings. Respondents claim that the requisition forms show that no work was performed on the bathroom doors and no tile work was done by Pythagoras.

Administrator has met her burden to show that Gregory Kavalos performed work for which he was not fully compensated, namely his work as a carpenter. Gregory's testimony establishes that he worked as a carpenter, and these statements are supported by the testimony of Calzolaio and Lousidor. Numerous other employees confirmed that Manni and Gregory worked together doing carpentry work. Gregory's age and the minor inconsistencies in his testimony are not sufficient to rebut the conclusion that he worked, at least part of the time, as a carpenter. Thus, Respondents have not met their burden to refute or negate the reasonableness of the inference that Gregory Kavalos worked as a carpenter. Respondents have not presented an

alternative estimate as to the amount of time that Gregory Kavalos worked as a carpenter, and, as such, investigator Zhu's assessment at a blended rate will be applied.[7] Gregory Kavalos is owed a total of $48,196.80 in back wages.

Mason Tenders

Administrator claims that Respondents misclassified and underpaid 22 employees as Tier B laborers when they actually performed mason tender work.[8] Delroy Green testified that he did demolition, carpentry, and set up and took down the scaffolding. (TR p. 56). He testified that it would take between two to three weeks to set up the scaffolding, and the same amount of time to take it down. (TR. Pp. 56-57). Green explained the nature of the demolition work he performed, which occurred when he was not working on the scaffold. (TR p. 57). Green stated that he would break the bathroom floor with a jackhammer and would chip the ceiling. (TR p. 57). Green further stated that he removed debris when necessary. (TR p. 58). When putting up the scaffold, Green used a wrench, a saw, and a hammer. (TR p. 59). When doing demolition, Green used a sledgehammer and a jackhammer. (TR p. 59). He testified that Riley and Franklin helped him on the scaffold and with demolition. (TR pp. 61-62). Green testified that he always received two checks, one for $14.00 and one for $6.00, which later increased to $8.00. (TR p. 66).

Investigator Zhu determined that a total of $51,215.37 is due to Green in back wages at a blended rate of 70% of the mason tender rate and 30% of the Tier B labor rate. (Supplemental Exhibits A-34a and A-35a). Pythagoras does not dispute that Green worked part of the time as a mason tender. (Resp. EX. 00). Pythagoras does dispute, however, investigator Zhu's 70/30 wage determination. (Admin Ex. 34). Respondents argue that this division of time is not supported by Green's testimony. Respondents attack the credibility of Green's statements, asserting that it did not take two weeks to set up and remove the scaffolding, especially given the fact that some of the buildings required less scaffolding.[9]

Neither party disputes that Green performed work as a mason tender and was not properly compensated for this time. Thus, Administrator has satisfied her burden to demonstrate that Green performed work for which he was improperly compensated. The Administrator must also produce "sufficient evidence to show that amount and extent of that work as a matter of just and reasonable inference." *Mt. Clemens,* 328 U.S. at 687. To meet this burden, Administrator has relied on investigator Zhu's assessment that Green is entitled to compensation for his time at 70% of the mason tender rate and 30% of the Tier B rate. It is noted that neither the employee nor the Administrator is required to establish the "the precise extent of uncompensated work."

7. The respondent has the burden of coming forward with evidence of the precise amount of work performed by each employee "at the risk of a judgment for the amount shown." *Wirtz v. Lieb*, 366 F.2d 412, 415 (10th Cir. 1966).

8. The employees include: Baffour Agyemang, Fabio Arbelaez, Philbert Franklin, Raymond Jesse Garcia, Raymond Garcia Jr., Delroy Green, Juan Hernandez, Thomas Justintiano, Jr., Federico Lagos, Jude Mersey, Shawn Mims, Clinton Orridge, Michael Pagan, Linval Pratt, Eric Quinnones, Edward Riley, Jose Rivera, Edward Tyler, Luis Vasquez, Jamie Velez, Steven Washington, and Marvin Woodward.

9. Respondents' argument that it did not take two weeks to set up the scaffold is without merit. Respondents have taken inconsistent positions on the issue of the length of time it took to assemble the scaffold(s). Respondents argued, in the case of Jude Merzy, that it *only* took two weeks to set up a scaffold. (Respondents' Brief at 34; TR p. 1896). I find that the testimony establishes that it took approximately two weeks to assemble a scaffold.

Thomas & Sons Building Contractors, Inc., 1996-DBA-37 (ALJ, Feb. 17, 2000), *aff'd.*, ARB Case No. 00-050 (ARB, Aug. 27, 2001). The employee should not be penalized by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. See, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). Thus, it is determined that Administrator has met her burden. While, the Administrator has not demonstrated with any particularity how much time Green spent performing mason tender work, such is not the Administrators burden, and Administrator's assessment meets the requirements of a just and reasonable inference.

The burden then shifts to the Respondents to present evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. Where the respondent cannot prove the precise amount of work performed, the respondent is "at the risk of a judgment for the amount shown." *Wirtz v. Lieb*, 366 F.2d 412, 415 (10th Cir. 1966). In such instances, it is the duty of the trier of fact to draw whatever reasonable inferences can be drawn from the employee's evidence. In the instant case, Respondents have alleged that Green is not entitled to compensation for his time at 70% of the mason tender rate and 30% of the Tier B rate on the grounds that the scaffolding work did not take as long as Green alleged. Respondents assert that Green is owed for 45 days of work at the mason tender rate. Respondents derived this assessment from a review of their records, including the requisition forms, and a detailed knowledge of the project. Investigator Zhu's assessment, on the other hand, is not based on a knowledge of the scope of the project; it is merely his attempt to be "fair and conservative."[10] (TR p. 671, 899-901, 1031, 1407, 1468, 1698). In light of the ascertainable and verifiable basis for Respondents' calculations, when compared with those of investigator Zhu, it is determined that Respondents have presented sufficient evidence to negate the reasonableness of the inference drawn from Green's testimony. Respondents' assessment that Green is entitled to an additional 45 days of compensation at the mason tender rate is credible and reliable. Thus, Green is owed a total of $12,214.12 in back wages.[11]

Edward Riley testified that Louisdor hired him as a laborer. (TR p. 129, 142). Riley testified that he worked for eight months (approximately October to May) laying down the plastic protection, and thereafter worked on the scaffolding with Green. (TR p. 130). The protective work Riley performed consisted of lining the sides of the walls, protecting the furniture, and putting runners down. (TR p. 131). Riley testified that he also worked demolition with Raymond Jesse Garcia, Tyler, and Quinones. (TR p. 131). With regard to his work on the scaffold, Riley testified, "we'd have to bring the poles, bring the beams, bring the planks, bring them to where [we] was working at, set them up, use ratchet, crescent, use a circular saw just in case we have to cut some of the planks, tighten up, make sure they were secure." (TR p. 131). Riley testified that he worked on the scaffolding with Green, Tyler, Quinones, Garcia, Pagan, Velez, and Woodard. (TR pp. 132-33). Stanley and Nick Petsagourakis and Louisdor all testified that Riley worked on the scaffolds. (TR p. 1859, 1889, 1891, 1947, 1949-50). Riley also did fencing work, which required digging a hole, pouring cement in, and then inserting a pole to

10. When testifying, investigator Zhu explained that he used a 70/30 ratio in order to be "fair and conservative" to all the employees. Investigator Zhu's method/ratio is not *per se* unreliable, however, in light of a precise estimate based on data of record, investigator Zhu's estimate is less credible.

11. 45 days multiplied by 7.5 reconstructed hours is a total of 337.5 hours worked. 337.5 times the mason tender rate of $36.19 yields a total of $12,214.12.

secure the fence. (TR p. 133). Riley testified that he received two checks totaling $20.00. (TR p. 137).

Investigator Zhu determined that Riley is owed $28,237.84 in back wages. (Supplemental Exhibits A-34a and A-35a). Investigator Zhu credited Riley with the Tier B rate from August 31, 2001 to May 2, 2002, the time he spent laying the plastic protection. Investigator Zhu calculated a blended rate at 70% of the mason tender rate and 30% of the Tier B rate for the rest of the time Riley worked on the project. Respondents admit that Riley performed some work on the scaffolds, but argue that the work was not continuous and was far less than that claimed by Riley. According to Respondents, Riley is owed $4,469.00 in back wages.

Administrator has met her burden to show that Riley performed work for which he was improperly compensated. Administrator has shown the amount and extent of the work as a matter of just and reasonable inference based on the testimony of Riley. Respondents do not dispute the nature of the work Riley performed, only the length of time he engaged in mason tender work. Respondents have presented a precise amount of work performed to rebut the reasonableness of the Administrator's assessment. Respondents derived this number from a review of the records and a knowledge of the scope of the project. In light of the ascertainable and verifiable basis for Respondents' calculations, when compared with those of investigator Zhu, it is determined that Respondents have presented sufficient evidence to negate the reasonableness of the inference derived from Riley's testimony. Thus, Riley is owed a total of $4,469.00 in back wages.

Fabio Arbeleaz testified that he made cement, cut bricks, worked on the scaffolding, and cleaned up debris outside the apartment buildings. (TR p. 255). To make the cement, Arbeleaz would use a mixing machine and a shovel. (TR p. 255, 260). He would arrive at 7 a.m. in the summer and 7:45 in the winter to start mixing the cement. (TR p. 255, 260). Arbeleaz testified that he was paid $20.00 per hour in two checks. (TR p. 262). Both Stanley and Nick Petsagourakis testified that Arbeleaz mixed the cement and would help to clean the yard. (TR p. 1898, 1944, 1947).

Investigator Zhu determined that a total of $44,576.63 is due in back wages to Arbeleaz. (Supplemental Exhibits A-34a and A-35a). Investigator Zhu used a blended rate of 70% of the prevailing rate for mason tenders and 30% of the prevailing rate for Tier B labor. Respondents do not dispute that Arbeleaz performed mason tender work, but dispute the amount of time that Arbeleaz spent performing such work. Pythagoras determined that Arbeleaz is entitled to an additional 244.5 hours of work as a mason tender. To derive this amount, Respondents gave Arbeleaz credit for every day that there was work performed on the sidewalk shed. Pythagoras also determined how many days the bricklayers were on site and would require cement. Pythagoras gave credit to Arbeleaz for these days at a rate one to two hours per day.[12]

Administrator met her burden to show that Arbeleaz performed work as a mason tender for which he was not compensated. Administrator has presented information to show the extent of the work as a matter of just and reasonable inference. Respondents, however, have met their

12. Respondents assert that it took 1 to 2 hours to mix the cement, as opposed to the 5 hours testified to by Arbeleaz. Respondents' assessment is found to be more accurate, and, therefore, credible.

burden to negate the reasonableness of the inference by presenting a detailed estimate of the hours that Arbeleaz worked as a mason tender. Respondents have explained precisely how they reached their determination, and I find that it is reasonable and credible and based on their knowledge of the project and a detailed review of their records. Thus, Arbeleaz is owed back wages in the amount of $8,848.45.[13]

Lindall Pratt testified that he worked as a mason tender doing "skim" for the ceilings, kitchens, and bathrooms. (TR pp. 313-15). Pratt also worked on the steps, replaced bricks, patched the basement ceiling, and worked on the parapet wall. (TR p 315). Pratt used the following tools in his work; trowel, mortar, level, sponge, brush, and float. (TR p. 325). Pratt testified that the signed statement he gave to investigator Zhu, stating that he was a laborer at $20.00 per hour, was not true. (TR p. 316). He testified that he was instructed by Lousidor to state that he was a laborer or he would loose his job. (TR pp. 315-317). Thereafter, Pratt again contacted the Department of Labor and stated that he worked as a mason. (TR p. 320). Subsequently, Pratt stated that he was a laborer, and at hearing testified that he was a mason tender. Pratt testified that he was paid with one check for $14.00 per hour, but sometimes received $20.00 per hour. (TR p. 329-330, 333-34).

Investigator Zhu determined that Pratt is owed a total of $22,034.20 in back wages. (Supplemental Exhibits A-34a and A-35a). Investigator Zhu determined that Pratt is entitled to compensation at a blended rate of $31.33, representing 70% of the mason tender rate and 30% of the Tier B rate. Respondents allege that Pratt's testimony lacks all credibility in light of his multiple inconsistent statements to investigator Zhu.

The testimony of Pratt, at the outset, does not establish that he performed work for which he was improperly compensated, and, therefore, Administrator has not met her burden. Pratt initially reported to investigator Zhu that he was a laborer, then called to tell him that he worked as a mason tender, and then reverted to his initial statement that he was a laborer. At the hearing, Pratt testified that he performed mason tender work. It is determined that the numerous inconsistent statements given by Pratt cast doubt on his credibility with regard to the nature of his employment. In light of his numerous statements, it cannot be ascertained what type of work he performed. As such, it is determined that Administrator has not met her burden. Pratt is not owed any back wages.

Filbert Franklin testified that he repaired the bathroom ceilings, helped Green build the scaffolds, and did demolition. (TR pp. 83-84). Franklin stated that he used an electric chipping gun while working on the ceilings, a sledgehammer to break the bathroom floor, and a ratchet and mechanical spanners when working on the scaffolding. (TR pp. 83-84). He testified that he worked on the scaffold for four to six months. (TR p. 85). He stated that before he began to chip away at the ceiling, he would put plastic down. (TR p. 97). Franklin testified that he received one check, and that the total amount varied between $14.00 and $22.00. (TR p. 88). Stanley Petsagourakis confirmed that Franklin cleaned the cement from the concrete ceilings. (TR p. 1947-48, 1950). Green and Richards confirmed that Franklin also did demolition and scaffold work. (TR p. 20, 62).

13. This figure was obtained by multiplying the number of hours (244.5) times the hourly rate of $36.19.

Investigator Zhu determined that Franklin is entitled to $38,347.49 in back wages. (Supplemental Exhibits A-34a and A-35a). Investigator Zhu found that Franklin was entitled to compensation for his time at a blended rate of $31.33, representing 70% of the mason tender rate and 30% of the Tier B rate. Respondents do not dispute that Franklin has performed work for which he was entitled to compensation at the mason tender rate. Rather, they dispute the amount of time he spent doing the work, and the percentage allocation of Tier B work in investigator Zhu's assessment. Respondents assert that only 4 bathrooms were demolished per day, as opposed to the 12 testified to by Franklin, and even then not every bathroom required demolition. (TR p. 98, 1351). Respondents determined, from a review of their records, that Franklin is entitled to an additional $5,832.00 in unpaid wages. (Resp. EX OO).

In the instant case there is no dispute that Franklin performed worked for which he was improperly compensated, and, as such, Administrator has met her burden. Respondents have presented evidence negating the reasonableness of the inferences drawn from Franklin's testimony and have put forward an assessment of the wages to which Franklin is entitled. It is determined that Respondents' assessment of the hours work is accurate and credible and is based on a knowledge of the scope of the project and a review of the records. In light of the ascertainable and verifiable basis for Respondents' calculations, when compared with those of investigator Zhu, it is determined that Respondents have presented sufficient evidence to negate the reasonableness of the inference derived from Franklin's testimony. Thus, Franklin is entitled to an additional $5,832.00 in unpaid wages.

Jude Merzy testified that he worked for seven months on the scaffolding with Green. (TR p. 416). Thereafter, Merzy performed tile work, which required that he use a chipping hammer to level out the floor, "Tinset" to set the tiles, and grout for the edges. (TR pp. 417-18).

Investigator Zhu determined that Merzy is owed $90,899.19 in back wages. Investigator Zhu credited Merzy with a blended rate of $31.33 (70% of the mason tender rate and 30% of the Tier B rate) for his work from November 9, 2001 to June 7, 2002. For June 14, 2002 through September 26, 2003, investigator Zhu credited Merzy with the tile layers rate of $45.08. Respondents argue that Merzy did not work on the scaffolds for seven straight months as a scaffold took approximately two weeks to set up and then would remain set up until the necessary work was completed, which took approximately three months. Respondents also claim that Merzy is not entitled to compensation as a tile layer because such work was contracted out. Respondents further claim that Merzy's testimony is not credible because he alleged that he performed work in over 1,300 bathrooms when there were only 704 bathrooms in the apartment complex to be renovated.

Administrator has met her burden to show that Merzy performed work for which he was not properly compensated, namely his work as a mason tender and tile layer. The amount and extent of Merzy's work as a skilled laborer is a matter of just and reasonable inference from his testimony. Respondents, however, have presented evidence questioning his credibility with respect to his work laying tiles. Both Calzolaio and Louisdor testified that the tile work was contracted out. (TR p. 1756, 1844). Louisdor further explained that the only tile work Merzy performed was the repair of the subcontractor's work that was not approved by the NYCHA. (TR pp. 1844-45). This repair work consisted of fewer than 10 bathrooms, as opposed to the over

1,300 bathrooms Merzy claimed to have worked on. Respondents, therefore, have met their burden to refute the assessment that Merzy is entitled to compensation for over a year of work at the tile layers rate.

Lousidor's testimony does establish, however, that Merzy performed work on approximately 10 bathrooms. For the time that Merzy worked on the tiles in the bathrooms, he is entitled to compensation at the tile layers rate of $46.08. Merzy testified that he would complete between 2 and 4 bathrooms per day. (TR p. 418). A conservative estimate, that he did two bathrooms per day, would mean that Merzy is entitled to compensation for 5 days of work as a tile layer. Thus, Merzy is owed a total of $1,728.00 for his work as a tile layer.[14]

Respondents also argue that Merzy's testimony that he worked for seven months on the scaffold is not credible, and, therefore, he is not entitled to compensation at the mason tender rate. The testimony establishes that a scaffold took approximately two weeks to assemble, and would remain in place between 45 days to three months, until the building was complete. No work was required on the scaffold once it was assembled. A review of the Daily Look Aheads for the period in question reveals that scaffold work was not performed everyday as Merzy claims. Rather, scaffold work is listed as being performed on twelve days in the seven months that Merzy alleged he performed daily scaffold work. Thus, Merzy could not have worked for a full seven months on the scaffold. As such, Respondents have presented sufficient evidence to negate the reasonableness of the conclusion that Merzy performed work every day for seven months as a mason tender. There is no corroborating testimony to establish that Merzy did work on the scaffold on the limited days when such work was, in fact, performed. As such, Respondents have met their burden, and Merzy is not entitled to back wages at the mason tender rate.

Raymond Jesse Garcia testified that every day for the first three months he worked on the scaffolding using a ratchet, wrench, and hammer.[15] (TR p. 184-85). After the scaffold work, Raymond Jesse Garcia worked inside with the demolition crew in the bathrooms, removing debris (including the bathtubs) from the buildings for about a year. (TR p. 185). Raymond Jesse Garcia testified that he would put plastic down before the demolition began. (TR p. 185). After working demolition, he did some "roof work," working as a mason tender, including working with the bricklayers and supplying them with cement and bricks. (TR p. 186). The roof work was not continuous because of the weather. (TR p. 187). Raymond Jesse Garcia stated that he received two paychecks totaling $20.00. (TR p. 190). He testified that Riley also worked doing scaffolding and demolition. (TR p. 191).

Investigator Zhu determined that Raymond Jesse Garcia is entitled to a total of $11,743.47 in back wages. (Supplemental Exhibits A-34a and A-35a). Investigator Zhu determined that from July 20, 2001 until November 2, 2001 and September 12, 2003 to October 24, 2004, Raymond Jesse Garcia was entitled to compensation at a blended rate of $31.33, representing 70% of the mason tender rate and 30% of the Tier B rate. From November 9, 2001 until August 15, 2003, Investigator Zhu determined that Raymond Jesse Garcia worked

14. This number was derived by multiplying 5 days times the reconstructed daily hours (7.5) for a total of 37.5 hours. This total was then multiplied by the prevailing rate for tile layers for a total of $1,728.00.

15. Raymond Jesse Garcia is the son of Raymond Garcia, Jr.

exclusively as a Tier B laborer. Respondents dispute that Raymond Jesse Garcia worked as a mason tender. Respondents assert that he could not have worked on the scaffolding for the first three months he was employed as no work was performed on the scaffold from August 1, 2001 until October 31, 2001. (Resp. EX E). Respondents also assert that he could not have worked on the roof because the roof work was contracted out. (TR p. 1755).

Raymond Jesse Garcia's testimony establishes that he performed work for which he was not properly compensated, namely the time he spent working as a mason tender. Therefore, Administrator has met her burden to demonstrate the amount and extent of work performed as a matter of just and reasonable inference. Respondents attempt to meet their burden by showing that there was no violation of the Act because Raymond Jesse Garcia could not have performed the work that he alleged. As noted above, Raymond Jesse Garcia could not have worked on the scaffold for three full months as the scaffold would take two weeks to assemble, after which no further work would be needed until the scaffold was taken down. Furthermore, according to the Daily Look Aheads no scaffold work was performed during the time Raymond Jesse Garcia alleged.

Respondents' assertion that Raymond Jesse Garcia could not have worked on the roof with the bricklayers because this work was contracted out is not persuasive. The testimony of Calzolaio establishes that roof work was, indeed, subcontracted out. (TR p. 1755). Calzolaio, however, did not articulate the nature of the roof work that was subcontracted out. According to the Daily Look Aheads, Pythagoras did perform roof work, including building the parapet wall, erecting a scaffold, and working on the bulkhead. Thus, Respondents have failed to present sufficient evidence to negate the conclusion that the specific type of work that Raymond Jesse Garcia performed was indeed subcontracted out. Respondents have not met their burden to negate the reasonableness of the inference drawn from Raymond Jesse Garcia's testimony. Thus, Raymond Jesse Garcia is owed back wages totaling $5,754.33 for his work as a mason tender.[16]

Steven Washington testified that he did "punch list," meaning that he checked the work that was already performed including the plumbing, plaster, cement, caulking, doors, windows, tiles, and electrical work. (TR p. 381). Washington also testified that he would unclog any backed-up drains and varnish and install missing cabinets. (TR p. 381). Washington used paint brushes, knives, razor blades, caulking, calking guns, hammers, chisels, screwdrivers, drills, a chipping gun, a level, and a circular saw. (TR p. 381). Washington testified that his statement to Investigator Zhu, in which he indicated that he removed debris, was inaccurate, and he only made the statement because he was told to do so by his boss' assistant, under threat of losing his job. (TR p. 383). Washington explained that he later called investigator Zhu to correct his previous statements. (TR p. 389). Washington testified that he received two checks per week totaling $20.00 per hour. (TR p. 386).

Investigator Zhu determined that Washington is due $21,377.07 in back wages at a blended rate of $31.33, representing 70% of the prevailing rate for mason tenders and 30% of the prevailing rate for Tier B labor. (Supplemental Exhibits A-34a and A-35a). Respondents dispute

16. The back wages due to Raymond Jesse Garcia were calculated by subtracting the wages from his alleged three months of work on the scaffold from the wages that investigator Zhu determined were owed ($11,743.47). See, Supplemental Exhibit 35a.

that Washington is entitled to compensation as a mason tender, arguing that Washington's testimony established that he did a variety of tasks, such as plumbing, electrical, and carpentry, thereby contradicting investigator Zhu's determination. Respondents also argue that Washington's testimony lacks credibility because he initially reported that he was a laborer and only later stated that he performed punch list.

Washington's testimony establishes that he performed a variety of tasks for which he was not properly compensated. Thus, Administrator has met her burden. Respondents' argument that Washington's performance of a variety of different tasks negates investigator Zhu's assessment is unpersuasive. Joseph Bianco, Field Representative for the Mason Tender's District Counsel of Greater New York, testified that punch list work is all considered mason tender work. (TR pp 52-23). Respondents have also attempted to refute the reasonableness of this inference by questioning his credibility based on his inconsistent statements to the investigator. The Daily Look Aheads list punch work as being performed nearly every day. No other employee is alleged to have performed such work. Washington's testimony that he performed "punch list" is corroborated by the testimony of Merzy. Respondents argument that some of the work Washington performed, such as electrical and plumbing, was not done by Pythagoras is not persuasive. Washington did not testify that he performed all of this work, merely that he checked that such work was done properly and that everything in the apartment was in working order so that it could be "turned over" to the NYCHA. Admittedly, Washington's initial statement casts doubt on his credibility, but is not sufficient to rebut the conclusion that he performed work for which he was not properly compensated. Thus, it is determined that Respondents have failed to meet their burden. Washington is owed a total of $21,377.07 in back wages, as calculated by investigator Zhu.

Clinton Orridge testified that he worked outside on the roof chipping out bricks and working on the parapet wall. (TR p. 502). Orridge used a jack hammer and a chipping gun while performing this work. (TR p. 503). Orridge testified that he would also lay the plastic and carry garbage and debris down the stairs so that someone else could take the garbage to the containers. (TR p. 503, 514-15). Orridge received $20.00 an hour in two checks, one for $14.00 and another for $6.00. (TR p. 506).

Investigator Zhu determined that Orridge is due $8,924.15 in back wages. (Exh. A-12, Supplemental Exhibits A-34a and A-35a). Investigator Zhu calculated the past due wages based on a blended rate of $31.33, representing 70% of the mason tender rate and 30% of the Tier B rate. Respondents claim that the only task that Orridge performed that would fall under mason tender work was his work on the roof, however, the roof work was contracted out by Pythagoras. (TR p. 1755).

Administrator has met her burden to show that Orridge performed work as a mason tender for which he was not properly compensated. Respondents attempt to refute this inference by arguing that Orridge could not have performed the work he alleged. The testimony of Calzolaio establishes that some roof work was subcontracted out. (TR p. 1755). Calzolaio, however, did not articulate the nature of the roof work that was subcontracted out. According to the Daily Look Aheads, Pythagoras did perform roof work, including, but not limited to, building the parapet wall, erecting a scaffold, and working on the bulkhead. Thus, the Respondents have

failed to present sufficient evidence to negate the conclusion that the specific type of work that Orridge performed was subcontracted out. Respondents have not met their burden to negate the reasonableness of the inference drawn from Orridge's testimony. Orridge is owed a total of $8,924.15 in back wages.

Michael Pagan testified that for a year he worked with the bricklayers, supplying them with cement, setting up the six-foot frame scaffold, and helping to set the four-foot stones on the roof. (TR p. 362). Pagan testified that he also worked with Green and Quinnones on the bridge scaffold for about three months. (TR p. 362, 367). Pagan also did debris removal for two months towards the end of the project. (TR p. 363). Pagan explained that he used a drill, hammer, ratchet, and wrench. (TR p. 364). Pagan received two checks and was paid at the rate of $20.00 per hour. (TR p. 366).

Investigator Zhu determined that Pagan is owed a total of $22,265.03 in back wages. (Supplemental Exhibits A-34a and A-35a). Investigator Zhu derived this figure from a blended hourly rate of $31.33 (70% of the mason tender rate and 30% of the Tier B labor rate). Respondents dispute that Pagan is entitled to compensation for any of his time at the mason tender rate because the roof work Pagan allegedly performed was subcontracted out.

Administrator has met her burden to show that Pagan performed work as a mason tender for which he was not properly compensated. Respondents question the credibility of Pagan's statements, arguing that he could not have worked on the roof. The testimony of Calzolaio establishes that some roof work was subcontracted out. (TR p. 1755). Calzolaio, however, did not articulate the nature of the roof work that was subcontracted out. According to the Daily Look Aheads, Pythagoras did perform roof work, including, but not limited to, building the parapet wall, erecting a scaffold, and working on the bulkhead. Thus, the Respondents have failed to present sufficient evidence to negate the conclusion that the specific type of work that Pagan performed was subcontracted out. Respondents have not met their burden to negate the reasonableness of the inference drawn from Pagan's testimony. Pagan is owed a total of $22,265.03 in back wages.

Jamie Velez testified that for thirteen months he worked as a mason tender. (TR p. 284). Velez testified that he would supply the bricklayers with the mortar, bricks, wall tiles, wire, nails, and footprints. (TR p. 284). Velez also cleaned up after the bricklayers, and helped to build the scaffolding around the incinerator on the roof. (TR p. 284). This scaffolding had to be set up and taken down daily. (TR p. 288). When working as a mason tender, Velez used mortar, a wheelbarrow, a hammer, and a shovel. (TR p. 293). After working as a mason tender, Velez was a flagman, stopping traffic. (TR p. 285). Otherwise, Velez worked cleaning up the apartments. (TR p. 286). Velez testified that he was paid between $14.00 to $20.00 an hour. (TR p. 294). Velez stated that Pagan worked with him as a mason tender. (TR p. 295).

Investigator Zhu determined that Velez is entitled to back wages in the amount of $32,070.28. (Supplemental Exhibits A-34a and A-35a). Investigator Zhu used a blended rate of $31.33, which represents 70% of the mason tender rare and 30% of the Tier B rate. Respondents dispute that Velez ever worked as a mason tender, arguing that the roofing work was subcontracted out.

Administrator has met her burden to prove that Velez performed work for which he was not properly compensated. Administrator has shown the amount and extent of this work as a matter of just and reasonable inference based on the testimony of Velez. Respondents question the credibility of Velez's statements, arguing that he could not have done roof work because it was contracted out. The testimony of Calzolaio establishes that some roof work was subcontracted out. (TR p. 1755). Calzolaio, however, did not articulate the nature of the roof work that was subcontracted out. According to the Daily Look Aheads, Pythagoras did perform roof work, including, but not limited to, building the parapet wall, erecting a scaffold, and working on the bulkhead. Thus, Respondents have failed to present sufficient evidence to negate the conclusion that the specific type of work that Velez performed was subcontracted out. Respondents have not met their burden to negate the reasonableness of the inference drawn from Velez's testimony. As such, Velez is owed $32,070.28 in back wages.

Edward Tyler testified that he worked inside and outside the buildings at the worksite. (TR pp. 746-48). When he worked inside, Tyler removed debris such as bathtubs and old cabinets. (TR pp. 746-47). When he worked outside, Tyler assisted the bricklayers on the roof, helped to erect the scaffolds, assisted in building the bulkhead, fixed fences, and planted grass. (TR pp. 746-47, 756). Velez, Pagan, and Orridge testified that Tyler worked on the roof cleaning up debris. (TR p. 295, 367-8, 507). Tyler testified that he worked with Riley, Paden, Velez, Raymond Jesse Garcia, and Raymond Garcia Jr. (TR p. 751). Tyler was paid $20.00 per hour. (TR p. 749).

Investigator Zhu determined that a total of $25,503.83 is due in back wages to Tyler. Investigator Zhu calculated this amount based on a blended rate of $28.10, representing 50% of the mason tender rate and 50% of the Tier B labor rate. Respondents have not presented specific evidence negating the testimony of Tyler.

Thomas Justiniano, Jr. testified that he worked at Vladeck for seven to ten months. (TR p. 77, 787). Justiniano performed demolition, scaffold work, painting, and roof work. (TR p. 778). In the bathrooms, Justiniano tore out the walls and shower panels, removed tiles, and stripped the walls from the mesh and rebars. (TR p. 778). While performing demolition, Justiniano used a sledgehammer, shovel, screwdriver, and a hammer. (TR p. 780). Justiniano cleaned up after himself and would shovel debris into plastic bags and discard them. (TR p. 778). For two hours a day, Justiniano would work on the roof handing bricks to the bricklayers and cleaning up after them. (TR pp. 780-81). Justiniano also worked in the yard stacking materials and assembling, disassembling, and cleaning the scaffolds. (TR p. 779). Justiniano would do demolition in the morning and then work on the scaffolds in the afternoon. (TR p. 780, 794). Justiniano testified that he worked with Green, Louisdor, Nick Petsagourakis, Shawn Mims, Tyler, Raymond Jesse Garcia, Raymond Garcia Jr., and Quinnones. (TR p. 784).

Investigator Zhu determined that Justiniano is owed a total of $7,397.68 in back wages. Investigator Zhu based his calculations on a blended rate of $28.10, representing 50% of the prevailing rate for mason tenders and 50% of the prevailing rate for Tier B laborers.

Raymond Garcia Jr. worked with his son Raymond Jesse Garcia on the Vladeck project. (TR p. 800). Raymond Garcia Jr. worked inside and outside the buildings transporting bricks,

cement, plaster, building scaffolds, applying tar, putting up flanges, cutting rebar, breaking dried concrete and bricks on the roof, carrying out debris, and sweeping the apartments. (TR p. 802, 819). Raymond Garcia Jr. estimated that he spent 70% of his time working outside on the roof or on the scaffold. (TR p. 801-03, 819). The other 30% of the time, Raymond Garcia Jr. worked inside the buildings bringing down debris or sweeping the building. (TR p. 802, 804, 819, 822). Raymond Garcia Jr. testified that he worked with Riley, Green, Tyler, Carrion, Quinnones, and Pagan. (TR pp. 808-09, 832). Raymond Garcia Jr. was paid $20.00 per hour. (TR p. 807).

Investigator Zhu determined that Raymond Garcia Jr. is entitled to $27,117.88 in back wages. Investigator Zhu based his calculations on a blended rate of $31.33, representing 70% of the mason tender rate and 30% of the Tier B labor rate.

Administrator has met her burden to show that Tyler, Justiniano, and Raymond Garcia Jr. performed work for which they were not properly compensated. The amount and extent of the work each individual performed is a matter of just and reasonable inference based on his testimony. The testimony of all three employees is credible and is not contradicted by any of the evidence of record. Respondents have not presented any specific evidence to contradict the testimony of Tyler, Justiniano, or Raymond Garcia Jr. As previously noted, the argument that none of the employees could have performed roof work because such work was contracted out is without merit. As such, Respondents have not met their burden to negate the reasonableness of the inference to be drawn from each employee's testimony. As such, each individual is owed back wages in the amount assessed by investigator Zhu as delineated above.

Non-Testifying Mason Tenders

Marvin Woodard was interviewed by investigator Zhu at Vladeck houses on November 25, 2002. (EXH A-32). Woodard provided a signed interview statement asserting that he unloaded bricks on the roof and shoveled debris from the apartments into the containers. Woodard claimed to have worked on the scaffolds for four hours each week. Woodard was paid $20.00 per hour. Investigator Zhu determined that Woodard is owed a total of $7,950.91 in back wages, computed at a blended rate of $31.33, representing 70% of the mason tender rate and 30% of the Tier B labor rate.

Juan Hernandez was interviewed by investigator Zhu on November 19, 2002, and he gave signed statements to the NYCHA and HUD. (EXH R-FFFF, EXH R-GGGG, EXH R-HHHH). Hernandez's statement indicates that he worked putting debris into containers, pushing containers outside, cleaning, moving materials, mixing mortar, and performing demolition. Hernandez used a shovel, broom, sledgehammer, and jackhammer. Hernandez received $20.00 per hour. Investigator Zhu determined that Hernandez is owed a total of $3,406.06 in back wages. Investigator Zhu calculated the back wages based on a blended rate of $24.05 per hour, which represents 25% of the prevailing wage for mason tenders and 75% of the prevailing wage for Tier B labor.

Eric Quinnones was interviewed by investigator Zhu on March 5, 2003 via telephone, and gave a statement to the NYCHA on August 1, 2003. (EXH R-IIII, EXH R-JJJJ). Quinnones stated that he laid bricks, cut stones for the roof, laid stones on the roof, mixed mortar, and

cleaned up. He used a trowel, hammer, shovel, broom, and a wheelbarrow. Quinnones was paid $20.00 per hour. Riley, Velez, Pagan, Merzy, Justiniano, and Raymond Garcia, Jr. all testified that they either worked with or saw Quinnones working on the scaffold, assisting on the roof, and laying plastic inside the apartments. Investigator Zhu determined that Quinnones is owed a total of $5,668.14. Investigator Zhu credited Quinnones with a blended rate of $28.10 per hour, representing 50% of the prevailing wage for mason tender and 50% for Tier B labor.

Shawn Mims filed out a mail-in interview form dated March 15, 2003. (EXH R-KKKK). He stated that he mixed cement, did demolition, worked on the scaffolds, laid bricks, painted, laid the plastic protection, and removed debris. Mims was paid $20.00 per hour. Investigator Zhu determined that Mims is entitled to a total of $6,682.90 in back wages, computed at a blended rate of $28.10. The blended rate represents 50% of the prevailing rate for mason tenders and 50% of the prevailing rate for Tier B labor.

Jose Rivera was interviewed by investigator Zhu at the Vladeck houses on November 25, 2002. (EXH A-31). Rivera stated that he drove a truck to the warehouse to pick up tiles and cabinets for the worksite, which he would unload using the forklift. He also used the forklift to remove garbage and skids three times a week. Rivera sometimes pumped water from the roof. Rivera was paid $20.00 per hour which later increased to $22.00 per hour. Investigator Zhu determined that Rivera is owed $16,718.16 in back wages computed at blended rate of $26.48, which represents 40% of the prevailing wage for mason tenders and 60% of the prevailing rate for Tier B labor.

Baffour Agyemang was interviewed by phone on March 2, 2005. (EXH R-HHH). Agyemang stated that he worked for Pythagoras from October 11, 2002 until May 21, 2004 with the exception of one month where he worked at another site. Agyemang stated that he gave instructions to the workers and walked around to supervise. For three hours a day, Agyemang used the Bobcat to lift bricks and concrete. Agyemang was classified on the payrolls as a Tier A or Tier B laborer and his pay rate was between $25.00 to $30.00 per hour. Investigator Zhu determined that Agyemang is owed $6,168.39 in back wages. Investigator Zhu calculated the back wages by subtracting the $20.00 rate for Tier B labor from the prevailing wage for mason tenders, $36.19. Investigator Zhu then multiplied the deficiency, $16.19, times the three hours a day that Agyemang performed mason tender work, to come up with a deficiency of $48.57 per day. Investigator Zhu then multiplied the daily deficiency by the 127 days that Agyemang should have received the prevailing wage for mason tenders.

Administrator has met her burden to show that Woodard, Juan Hernandez, Quinnones, Mims, Rivera, and Agyemang all performed work for which they were not fully compensated, namely their work as mason tenders.[17] The amount and extent of the work they performed is a matter of just and reasonable inference from their testimony. Respondents have not presented any specific evidence to negate the inference that the named employees performed mason tender

17. The work performed by Rivera and Agyemang is classified as mason tender work under the collective bargaining agreement (CBA) admitted at the hearing as A-13. Joseph Bianco, Field Representative for the Mason Tender's District Counsel of Greater New York, testified that the CBA was applicable, and confirmed that the work performed by Rivera and Agyemang was that of a mason tender. (TR pp. 519-523).

work.[18] The testimony of the employees is not contradicted by any evidence of record, and is deemed credible. Thus, Respondents have failed to meet their burden, and Woodard, Hernandez, Quinnones, Mims, Rivera, and Agyemang are entitled to back wages in the amounts calculated by investigator Zhu as delineated above.

Investigator Zhu also determined that Luis Vasquez was misclassified as a Tier B laborer when he actually performed work as a mason tender. (EXH A-8, A-9). As such, investigator Zhu determined that Vasquez is owed a total of $26,297.73 in back wages. Investigator Zhu's calculations are based exclusively on the testimony of Franklin, as Vasquez did not testify or provide a statement in the instant matter. (TR pp. 893-94). It is determined that Administrator has not met her burden to prove that Vasquez performed work for which he was not properly compensated. Basing the computations exclusively on the testimony of another employee is speculative and unreliable. Allegations of misclassification in the instant case are highly fact specific and based on the employee's testimony. Without further testimony, from Vasquez or corroboration by another employee, no assessment can be made. As such, it is determined that Vasquez is not entitled to any back wages.

Investigator Zhu also determined that Fredrico Lagoa was misclassified as a Tier B laborer when he actually performed mason tender work. (EXH A-8, A-9). Thus, investigator Zhu determined that Lagoa is entitled to $7,306.60 in back wages. Investigator Zhu did not reveal his basis for concluding that Lagoa worked, at least part of the time, as a mason tender. (TR pp. 868-89, 876). It is determined that Administrator has failed to meet her burden to prove that Lagoa performed work for which he was not properly compensated. Administrator has provided absolutely no basis to assess the accuracy of investigator Zhu's determinations since there is no testimony to establish the nature of the tasks that Lagoa performed. As such, Lagoa is not owed any back wages.

Plasters

Administrator argues that Jesus Hernandez and Enriques Roman were misclassified as Tier B laborers when they in fact performed work as plasterers. Hernandez testified that he worked as a plasterer, and he would start by entering an apartment and checking the plaster on the walls. (TR p. 221). Then he would scrape and remove the rotten portions, put the "screening on, and then you would put plaster in the entire apartment." (TR p. 222). Hernandez would mix the lye for the job in the apartment. (TR pp. 242-243). Hernandez testified that he started plastering in the apartments at 7:00 a.m. (TR p. 224). Hernandez testified that the only other job he did besides the plaster was to mix cement. (TR p. 223). Hernandez testified that he has been doing plaster work for about 10 years. (TR p. 251).

Respondents question the credibility of the testimony of Hernandez. First, Respondents argue that there is no evidence that Hernandez ever worked at Vladeck houses; Hernandez is not on the certified payroll records, and the only documents that suggest he worked at Vladeck houses are several paystubs and a W4 form. Furthermore, the signature on Hernandez's social

18. Respondents question the statements themselves, arguing that they were not notarized, made under oath, or even attributable to the employee. Respondents, however, have not presented any evidence that would actually call into question the credibility of the statements.

security and New York State Identification Card are drastically different from his signature on his W4 form. Respondents further allege that Hernandez's testimony is inconsistent with the actual scope of work done on the project. Hernandez was not able to state where the worksite was, he testified that he entered the apartments and began work at 7 a.m., and he testified that he plastered the entire apartment when the work was limited to the bathroom and kitchen.

Administrator has failed to meet her burden to show that Hernandez performed work for which he was not fully compensated because the testimony of Hernandez is, at the outset, not credible. Hernandez's lack of knowledge regarding the project itself and the work he did therein casts doubt on his credibility. Particularly telling is the fact that Hernandez testified that he entered the building and began work at 7 a.m., when no work could take place in the buildings before 8 a.m. Furthermore, there is no corroboration from any other employees or supervisors that Hernandez worked as a plasterer on the project so as to lend support to his testimony. There is also ample evidence suggesting that Hernandez did not work at the site, yet alone as a plasterer. As such, it is determined that Hernandez is not owed any back wages.

Enriques Roman did not testify, but provided a signed statement to the effect that he worked as a plasterer. (Exh R-AAA). He stated that he "mixed stratolight cement" and then plastered the apartments. (Exh R-AAA). His statement reported that he worked at least 45 hours a week, and sometimes worked on Saturday, but did not receive overtime. (Exh R-AAA).

Respondents question the credibility of the statement, noting that it was not made under oath, was not notarized, and cannot be identified as being given by Roman. Furthermore, Respondent's argue that Roman's statement that he worked 9 hours a day, for 45 hours per week casts doubt on his credibility.

Administrator has failed to meet her burden to demonstrate that Roman performed work for which he was not properly compensated. It is determined that his statements are not credible. His statement that he worked 9 hour days is not supported by any other testimony or facts. Rather, it is just the opposite; the testimony establishes that the employees could only work inside the apartments from 8:00 a.m. to 3-3:30 p.m. Furthermore, the testimony of Roman has not been corroborated by any other employees or supervisors. Administrator has failed to meet her burden, and, as such, Roman is not entitled to back wages.

Painters

Christian Strickland was classified on the certified payroll records as a painter.[19] (EXH A-8, A-9). The prevailing wage for painters is $40.16. A review of the certified records reveals that Strickland was not paid the proper prevailing wage each week. Thus, as Administrator claims, Strickland is owed back wages. Investigator Zhu calculated the back wages at a total of $2,399.04. To calculate the back wages due, Investigator Zhu multiplied the total number of hours Strickland worked, as shown on the certified payroll, by the prevailing wage rate for painters to determine the total prevailing wages due for the week. Investigator Zhu then

19. In her Brief, Administrator argues that Strickland was not paid the prevailing fringe benefit. However, in computing the back wages allegedly owed to Strickland, Administrator only alleges that he was not paid the proper prevailing wage rate. As such, he will be discussed in the section on improper payroll classifications, as opposed to the section on fringe benefits, *infra*.

subtracted the wages paid from the prevailing wages due for the week. Respondents do not dispute investigator Zhu's assessment, and the failure to pay the proper wage rate is evident from the certified payroll records. As such, Strickland is entitled to back wages totaling of $2,399.04.

Prevailing Wage and Janitorial Employees

Administrator and Respondents dispute whether the workers hired to clean the public areas during construction fall under the Act and must be paid the prevailing wage. Administrator argues that the DBA applies to all mechanics or laborers employed directly upon the site of work, thus covering the daily cleaning performed in conjunction with the construction. Respondents, on the other hand, argue that the cleaning employees are not covered under the Act because the regulations governing prevailing wages only apply to work that *must* be performed under the contract. [Emphasis added]. Respondents argue that the terms of the contract only require that they clean the worksite "at the end of the workday," and, therefore, the cleaning that Pythagoras performed during the day was "voluntary" and outside the purview of the DBA.[20]

The workers in question were hired after the project was underway in response to complaints by the NYCHA regarding the condition of the common areas during the workday. The employees in question were classified by Respondents under the headings "cleaning," "janitors," or "janitorial." (TR p. 1760). The record contains the testimony and statements of three janitorial employees. Tereza Ubinas testified that she was hired around May of 2001 by Louisdor. (TR pp. 165-166). Her responsibilities included sweeping and mopping in addition to performing dust control. (TR p. 166, 174-75). Ubinas cleaned the hallways, and, on occasion inside the apartments. (TR p. 166, 174-175). Ubinas also cleaned the Pythagoras and NYCHA offices. (TR pp. 173). She was paid $13.00 per hour during her first year of employment and thereafter received $14.00 an hour. (TR p. 168). Ubinas stated that she worked from 8:00 a.m. until 4:00 p.m. (TR pp. 167-168). In her statement, Marie Paul indicated that she was hired to work at the Vladeck houses in June of 2001. (EXH A-30). Paul cleaned bathrooms, removed paint from the floor, and swept and mopped the hallways, stairs, and floors. Paul was compensated at the rate of $15.00 per hour and worked from 8:30 a.m. until 3:45 p.m. (EXH A-30). Jasline Francois worked at Vladeck houses beginning in June of 2002. (EXH A-33). She worked sweeping and mopping the floors and cleaning the bathrooms and kitchens. (EXH A-33). Francois worked from 8:00 a.m. until 4:00 p.m. (EXH A-33). She was paid $13.00 an hour from June of 2002 until June of 2003, and then received $20.00 per hour from June of 2003 until she finished working at Vladeck houses in December of 2003. (EXH A-33).

The DBA requires that, in all contracts involving federal construction projects, mechanics and laborers employed directly on the site of the work be paid local prevailing wage rates as determined by the Secretary of Labor. The janitorial workers fall within the definition of "mechanics and laborers," found at 29 C.F.R. § 5.2, which includes those employees whose duties are manual or physical in nature as opposed to mental or managerial. 29 C.F.R. §5.2(1) defines the "site of the work" as

20. The relevant contractual provision states: the Contractor shall clean all public and tenant areas at the end of the work day, including broom sweeping and wet mopping all floors. All cleaning shall be done to the complete satisfaction of the N.Y.C.H.A. Recleaning shall be required in order to comply with N.Y.C.H.A. acceptable standard. (Resp. Ex. B).

> The physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.

29 C.F.R. §5.2(1). The plain language of the regulation makes it clear that the janitorial employees are covered under the Act as they were employed on the site of the work.

Despite the fact that the janitorial employees fall within the scope of the Act, Respondents argue that the janitorial employees worked during the day and, therefore, their work was not required under the contract and not covered by the DBA. This argument is unpersuasive. The agreement between the parties that the cleaning was to be performed at the end of the workday cannot override the government contract. Additionally, the DBA has been construed to include janitorial employees in order to prevent circumvention of the law by a limited contractual provision. See, *In the Matter of: Thomas J. Clement*, 1985 WL 167223 (WAB Case No. 84-12)(Jan. 25, 1985).

Furthermore, Enrique Lopez-Mena, regional wage specialist for the Northeast Region of the Wage and Hour Division, testified that employees performing cleaning work in the public areas for Pythagoras were covered by the construction contract and were entitled to be paid the prevailing wage. (TR pp.556-57). Lopez-Mena further explained that under Wage and Hour Opinion Letter DBRA-84, employees who engage in cleaning work while the contract is "open" and construction is being performed are subject to the prevailing wage requirements. (EXH A-16, TR p. 575). Lopez-Mena testified that any cleaning that is incidental to the construction is covered by the contract. (TR p. 578).

Respondents further argue that the testimony does not establish that cleaning was done in the active areas of construction. This argument is also without merit, and is directly contradicted by the testimony. James Carrion, a foreman, testified that he directed the janitorial employees to clean inside the apartments. (TR p. 175). Furthermore, both Francois and Paul signed interview statements indicating that they cleaned in the apartments. (EXH A-30, A-33). It is not believable that Respondents hired and paid employees to clean areas of the building that were not affected by its construction activities.

Thus, the Act's implementing regulations, case law, and testimony establish that the janitorial employees are covered under the Act. Respondents have failed to provide any support for their assertion that the DBA only covers work that is *required* under the contract.[21] Therefore, the janitorial employees were entitled to be paid the Tier B labor rate.

Investigator Zhu calculated the back wages for three janitorial employees. Investigator Zhu determined that Ubinas is entitled to a total of $14,856.80. To calculate the back wages, investigator Zhu multiplied the total number of hours she worked in each workweek, as shown

21. If Respondents wish to make such an argument, it is arguable that the daily cleaning *became required* under the contract after Pythagoras was directed by Joseph Borelli, assistant superintendent for NYCHA on the project, to clean during the day. (TR p. 1814).

on the certified payroll records, by the blended rate of $18.60, which represents 80% of the rate for Tier B laborers.[22] Investigator Zhu then subtracted the gross wages paid from the total prevailing wages due for the week. Investigator Zhu calculated that Paul is owed a total of $14,028.00 for her work as a janitor at the worksite. Investigator Zhu assessed her wages with the formula used for Ubinas, except that Paul was credited with the full Tier B labor rate as all her work was performed on the Pythagoras worksite. Investigator Zhu determined that Francois is owed a total of $5,782.00. Investigator Zhu used the Tier B labor rate of $20.00 per hour in assessing her back wages.

Based on the computations of Investigator Zhu, the janitorial employees are owed a total of $34,666.80 in back wages.

Fringe Benefits

Administrator alleges that Respondents failed to pay the proper fringe benefits to three employees; Luis Bermeo, Ivan Cajamarca, and Manuel Tenesca.[23] Administrator alleges that Pythagoras' failure to pay the proper fringe benefits are evidenced by Pythagoras' certified pay roll records and the fringe benefit checks that were submitted to the Administrator.

Luis Bermeo was listed on the certified payroll records as a bricklayer or concrete worker, however, he did not receive the required fringe benefit rate during certain weeks. (EXH A-8, A-9, A-15, A-34). The applicable fringe benefit rate for concrete workers was $9.51 and $15.46 for bricklayers. Investigator Zhu testified that he calculated the back wages by multiplying the total number of hours worked on the certified payrolls by the applicable fringe benefit rate for the classification to determine the total fringe benefit due for the week. (TR pp. 937-38). Investigator Zhu then subtracted any fringe benefits paid from the fringe benefits due to determine the amount of back wages owed. Investigator Zhu determined that a total of $979.09 is due to Bermeo.

Ivan Cajamarca was classified on the certified payroll as a bricklayer, and he did not receive the required fringe benefits each workweek. (EXH A-8, A-9, A-15, A-34). Investigator Zhu determined that he is owed a total of $834.32 based on the prevailing fringe benefit rate for bricklayers of $15.46.

Manuel Tenesaca was also classified as a bricklayer, but did not receive the proper fringe benefits for each week worked. (EXH A-8, A-9, A-15, A-34). Investigator Zhu determined that a total of $870.70 is due to Tenesaca based on the prevailing fringe benefit rate for bricklayers of $15.46.

Respondents do not dispute that the aforementioned employees were not paid the proper fringe benefits. Thus, Bermeo, Cajamarca, and Tenesca are entitled to the fringe benefits

22. Ubinas testified that she also cleaned inside the Pythagoras and NYCHA offices for an hour each day. As a result, investigator Zhu did not credit her for the full Tier B labor rate.

23. As indicated in note 18, *supra*, Strickland was discussed under the section on prevailing wage rate for painters as opposed to the section on fringe benefits, based on the Administrator's back wage calculations.

calculated by investigator Zhu as delineated above. The total fringe benefits owed total $2,684.11.

Debarment

Administrator is seeking debarment of Stanley Petsagourakis as well as Pythagoras General Contracting Corporation for a period of three years on the grounds that they committed "aggravated or willful violations" of the Act. Administrator argues that willful conduct is evidenced by the following: (1) a failure to classify workers as carpenters or mason tenders despite knowledge that such work was performed; (2) a failure to list employees on the certified payroll records; (3) the underpayment of wages and the falsification of certified payroll records; (4) continued violations after being put on notice by the investigator; and (5) witness intimidation. Respondents dispute these allegations, arguing that the Administrator has failed to establish any willful conduct on behalf of Pythagoras or Stanley Petsagourakis. Respondents argue that the focus in debarment cases is whether the party attempted to cover up a violation, whether there were numerous acts that resulted in violations, or whether the party continued to engage in unlawful practices after becoming aware of a violation. Respondents assert that they did not engage in any of said actions, and, therefore, debarment is improper.

Debarment is intended to foster compliance with applicable labor standards. See, *Copper Plumbing and Heating Co. v. Campbell*, 290 F.2d 368, 372 (D.C. Cir. 1961). Violations of the DBA do not, *per se*, require debarment. 29 C.F.R. §5.12(a)(1), which governs debarment proceedings for violations of the labor standards provisions of Davis-Bacon related acts, states:

> Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes…other than the Davis Bacon Act, such contractor or subcontractor of any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list…) to receive any contracts or subcontracts subject to [the Davis-Bacon Act or Related Acts].

The Wage and Appeals Board has held that the term "willful" is to be construed in accordance with the Supreme Court's decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). Under *Richland Shoe*, an employer's action is deemed "willful" where "the employer knew or showed reckless disregard for the matter as to whether its conduct is prohibited by statute." *Richland Shoe*, 486 U.S. at 128. While "mere inadvertent or negligent conduct would not warrant debarment, conduct which evidences an intent to evade or a purposeful lack of attention to a statutory responsibility does. Blissful ignorance is not a defense to debarment." *Cody-Zeigler, Inc*., 2003 WL 23114278 [quoting, *L.T.G. Construction Co*., 1994 WL 764105 (WAB No. 93-15)(December 30, 1994)]. Violations of the DBA do not have to be open and deliberate in order for an employer to be disbarred. *In the Matter of: Martell Construction Co., Inc*., 1986 WL 193129 (WAB Case No. 86-26)(August 7, 1986).

At the outset, it is noted that an experienced federal contractor is presumed to have knowledge of the requirements under the DBA. In *Ray Wilson Co*., ARB Case No. 02-086, 2000-DBA-14 (ARB, Feb. 27, 2004), the ARB held,

> When the government awards a contract, or when a portion of the work is subcontracted, there has to be a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows what wages the company is paying its employees and what the company and its competitors must pay when it contracts with the federal government.

Slip op. at 12. Prior to starting the Vladeck housing project in 2001, Pythagoras engaged in public work for a period of fifteen (15) years. (TR pp. 1913-14; Exh A-39, p. 8). Pythagoras had performed work on four (4) other NYCHA projects that were subject to the DBA and required the payment of prevailing wages. (TR p. 1972). Furthermore, Stanley Petsagourakis and Calzolaio testified that they were aware of the requirement to pay the prevailing wages on federally-funded contracts. (TR p. 1918, 1972, 1784; EXH A-39, p. 9). Stanley Petsagourakis even used the Wage Decision to help him estimate the cost of the project. (TR p. 1918). Thus, Pythagoras and Stanley Petsagourakis are deemed to have knowledge of the DBA's requirements and their obligations under the Act.

The ARB has held that an employer is put on notice regarding the misclassification of employees after being informed of violations by the Wage and Hour Division. *P & N, Inc./Thermodyn Mechanical Contractors, Inc*., ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996). An employer who allows the violations to persist demonstrates a "reckless disregard" for its obligations under the Act. *Id*. at 6. Having been reminded of its obligations under the DBA and advised of the failure to fulfill these obligations, a respondent becomes responsible for supervising its employees to ensure compliance with the DBA. *Id*. In *P & N, Inc*. the ARB held that, after meeting with the Wage and Hour Investigator, the respondent's managers should have taken steps such as regularly visiting the site, observing the work being done on the site, and reviewing the payroll records to ensure that the employees were being paid for the work performed at the proper hourly rate. *P & N, Inc./Thermodyn Mechanical Contractors, Inc*., ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996). Similarly in *Berbice Corp*., 1998-DBA-9 (ALJ, Apr. 16, 1999), the ALJ found that where the company's officers allowed the violations to persist there was sufficient evidence of "an intent to evade or a purposeful lack of attention to a statutory responsibility in support of debarment."

In the instant case, Stanley Petsagourakis testified that he became aware of the investigation by the Wage and Hour Division in November of 2002. (TR p. 1935). Investigator Zhu testified that he notified Stanley Petsagourakis of the wage violations in June of 2003. (TR p. 592). After being notified of the violations, Respondents failed to reform their methods of supervising and paying their employees for the work that they performed and failed to alter their manner of record keeping. In fact, Calzolaio testified that Pythagoras did not pursue any action to change the way that employees were being paid or the records were kept after learning of the investigation and the violations. Instead, the wage violations continued until the project itself ended in February of 2004. In light of the notification by the investigator of the Wage and Hour Division of the violations, Respondents had an obligation to take appropriate measures to correct

the violations and ensure that they henceforth complied with the Act. Respondents failed to pursue corrective action, and all of their actions after being notified of the violations can be considered willful, thereby subjecting Respondents to debarment.

Falsifying payroll records and certified payrolls also constitutes a sufficient basis for debarment. *P & L Fire Protection, Inc*., 1994-DBA-66 (ALJ, May 15, 1997); *Dumarc Corp*., Case No. 2005-DBA-7 (ALJ, Apr.27, 2006). The underpayment of prevailing wages and submission of false payroll records in order to "mask" the underpayments constitutes a willful violation of the DBA and warrants debarment. *Abhe & Svoboda, Inc*., ARB Case Nos. 01-063, 01-066, 01-068, 01-069, 01-070, ALJ Case Nos. 1999-DBA-20 to 27 (ARB, July 30, 2004).

The DBA required Respondents to submit true and accurate certified payroll records. Calzolaio and Stanley Petsagourakis testified that they signed the payrolls every week, thereby certifying their accuracy. (EXH A-8, A-9, TR p. 1753, 1969-71). Pythagoras employees testified, however, that the records were not accurate; that they failed to reflect the 7 ½ hours a day worked by employees nor did they contain the proper payroll classifications. The employees' statements were corroborated by Pythagoras employees who testified that they failed to re-classify workers even after they were assigned work in a different job category. For example, Stanley Petsagourakis admitted that he was fully aware that Richards and Hall performed carpentry work, yet they were never classified on the certified payroll records as carpenters. Additionally, Stanley Petsagourakis was aware that the project would require a significant amount of mason tender work, however, no employees ever appeared as mason tenders on the certified payrolls. The aforementioned examples make it clear that the payrolls were certified to allow Pythagoras to pay the lowest prevailing wage rate, $20.00 for Tier B labor, when Pythagoras knew that employees were performing work that entitled to them to a higher rate of compensation. While the violations in the instant case do not demonstrate flagrant, intentional payroll falsification, the evidence clearly demonstrates that Respondents misclassified the majority of employees as Tier B laborers, even after meeting with the Wage and Hour investigator. Said actions are more than merely negligent and demonstrate an intent to evade the prevailing wage requirements under the DBA. As such, Respondent's actions are willful and subject them to debarment.

Administrator further argues that Stanley Petsagourakis' visits to employees' homes prior to the hearing amount to witness intimidation and constitute a willful violation of the Act that warrants debarment. Testimony at the hearing established that Stanley Petsagourakis and Lousidor traveled together to visit the homes of Richards and Green, shortly after they were identified as witnesses. Richards testified that Stanley Petsagourakis and Louisdor arrived unexpectedly at his home and told Richards that he would be "taken care of" if he testified that he only worked 2 hours per day as a carpenter and spent the rest of his time cleaning. (TR p. 23, 39-40). Green testified that Stanley Petsagourakis and Louisdor showed up at his home the same evening, but he refused to speak with them. (TR p. 68-9). Arbeleaz testified that Nick Petsagourakis unexpectedly arrived at his home in February of 2007, the weekend before he was scheduled to testify for the Administrator. Arbeleaz testified that prior to the visit, he had not seen or spoken with Nick Petsagourakis since 2004. (TR pp. 264-65). Nick Petsagourakis allegedly asked for Arbeleaz's phone number and told him to call Calzolaio. (TR p. 265).

Arbeleaz testified that he did not call Calzolaio because he assumed that he wanted to discuss the case. (TR pp. 265-66).

Respondents do not dispute that these visits occurred. Lousidor testified that Stanley Petsagourakis called him to arrange a time to go visit Green at his home. (TR pp. 1845-46, 1866). Louisdor further testified that he suggested that they also visit the home of Richards. (TR pp. 1846, 1866, 1957-58). Stanley Petsagourakis testified that he only went to speak with Richards and Green to tell them to "just say the truth." (TR pp. 1957-59). Stanley Petsagourakis stated that he wanted to talk with Richards and Green because he was afraid that they were going to lie in an attempt to recover a greater sum of money. (TR p. 1957). Stanley Petsagourakis denies ever telling either Richards or Green to lie. (TR p. 1959).

The evidence establishes that shortly after several witnesses were identified, or before they were scheduled to testify, they received unannounced home visits by the owner and manager of Pythagoras. Richards testified that he was told to lie. I previously found herein that Richards's testimony regarding the nature of his employment was credible, thereby lending support to the accuracy and credibility of his statements on the instant matter. Even if Stanley Petsagourakis did not explicitly tell Richards, or the other employees, to lie, his unannounced visits to their homes, and his brother's visit to Arbeleaz's home, prior to the hearing are wholly inappropriate. The visits suggest to the named witnesses the manner in which they should testify; favorably for Pythagoras.

The actions of Stanley and Nick Petsagourakis and Louisdor, attempting to influence employee testimony in their favor, suggests that they had knowledge of their prior violations of the Act, specifically the failure to pay the prevailing wage rates. Their behavior indicates that they were further attempting to "mask" these violations. [Emphasis added]. As such, their behavior is willful and is additional evidence weighing in favor of debarment.

The Administrator is also seeking debarment of Stanley Petsagourakis, president of Pythagoras. In order to enforce compliance, and consistent with the public policy underlying the Acts, the Wage Appeals Board has held that debarment can be sought against the principals of corporations as well as the corporation itself. See, In *the Matter of: Facchiano Construction Company, Inc.*, 1991 WL 523859 (WAB Case No. 91-06)(August 29, 1991). A debarment that is not directed against the principals of an ineligible firm may be an ineffective tool for achieving compliance with labor standards requirements. *Id*.

Stanley Petsagourakis was aware of the prevailing wage rate requirements, both by his own testimony and the presumption based on his experience as a contractor on federally funded projects. Employers performing contracts under the DBA have the responsibility to ensure that the work performed by their employees is in compliance with DBA requirements. *Marvin E. Hirchert d/b/a M&H Construction Co*., WAB Case No. 77-17, Oct. 16, 1978, slip op. at 6, citing, *C.M. Bone*, WAB Case No. 78-04 (Sept. 13, 1978). To meet his obligations under the Act, Stanley Petsagourakis needed to have knowledge of the wages being paid to his employees, the type of work those employees were performing, and an understanding of the substance of the certified payroll records. Ignorance of these evidences an indifference towards, and a reckless disregard of, Stanley Petsagourakis' obligations under the law. It is a willful violation of the law

where employers fail to take steps to determine the propriety of their conduct. See, *P & N, Inc./Thermodyn Mechanical Contractors, Inc*., ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996); *Brock v. Wilamowsky*, 833 F.2d 11 (2nd Cir. 1987).

Stanley Petsagourakis cannot escape debarment on the grounds that that he did not have direct knowledge of the violations. Blissful ignorance is not a defense to debarment and is "no way to operate a business." *Berbice Corp*., 1998-DBA-9 (ALJ, Apr. 16, 1999). The case law is clear that a respondent's officers need not have direct certain knowledge of misclassification in order to be debarred; actual or constructive knowledge of the misclassification is sufficient. *P & N, Inc./Thermodyn Mechanical Contractors, Inc*., ARB Case No. 96-116, 1994-DBA-72 (ARB, Oct. 25, 1996); See also, *KP & L Electrical Contractors, Inc*., 1996-DBA-34 (ALJ, Dec. 31, 1998), *aff'd in part*, ARB Case No. 99-039 (ARB, May 31, 2000). Stanley Petsagourakis can be charged with constructive knowledge in the instant case. Stanley Petsagourakis signed his employees' paychecks and the certified payroll records. He further testified that he knew that the project would require a significant amount of mason tender and carpentry work. Despite this knowledge, Stanley Petsagourakis signed certified payrolls that listed only two carpenters and no mason tenders. Stanley Petsagourakis knew of the requirements to pay prevailing wages yet failed to examine the wages being paid his employees, the nature of the work they performed, or the accuracy of the certified payroll records, thereby violating his responsibilities under the Act. Stanley Petsagourakis is not, as Respondents assert, being disbarred merely based on his role as the president of the company. Stanley Petsagourakis is being disbarred because he is a responsible individual involved in the management of the company who disregarded his obligations to his employees under the Act.

Respondents have argued that they cooperated with the investigation initiated by the Wage and Hour Division, and, on their own initiative, investigated the matter. See, Respondents' Brief at 55. While it is true that Pythagoras cooperated with the investigation, this fact does not absolve them of liability or mitigate against debarment. See, *Structural Concepts, Inc*., 1994-DBA-23 (ALJ, Feb. 23, 1995)(while mitigating factors may affect debarment under labor standards regulations, they do not have an impact on the debarment issue under the DBA.). Furthermore, the actions taken by Pythagoras, such as admitting that monies were owed, does not reflect any change in company policy that would ensure that violations do not occur in the future. Neither Pythagoras nor Stanley Petsagourakis have indicated what actions, if any, they have taken to revise their classification and time keeping methods. Similarly, Pythagoras has not indicated that it has altered its certified payroll records, which do not meet the requirements of the DBA. Thus, the cooperation of Pythagoras with the investigation has no effect on the outcome of the debarment proceedings.

Upon review, it is determined that Administrator has met her burden to show that Pythagoras and Stanley Petsagourakis disregarded their obligations to their employees. The violations delineated above demonstrate that Respondents knew or had a reckless disregard for their responsibilities under the Act. As Respondents committed aggravated or willful violations within the meaning of 29 C.F.R. § 5.12(a)(1), they are debarred for a period of three years.

CONCLUSION

Thus, Respondents are found to have committed violations of the DBA. These violations include the failure to pay the employees for all the hours they worked and the failure to pay the proper prevailing wage rates and fringe benefits. Pythagoras owes a total of $439,793.78 to its employees. Pythagoras General Contracting and Stanley Petsagourakis are debarred for a period of three years.

ORDER

In consideration of the aforesaid, it is hereby ORDERED THAT**:**

1. Pythagoras General Contracting Company and Stanley Petsagourakis be DEBARRED under 29 C.F.R. § 5.12(a)(1) of the regulations implementing the Davis-Bacon Act for a period not to exceed three years;

2. The New York City Housing Authority shall release to the Administrator the $731,343.79 that is being withheld from Pythagoras General Contracting Company for the purpose of distributing $439,793.78 to the underpaid workers in accordance with this decision; and

3. The Administrator shall return to Pythagoras General Contracting Company the funds withheld by the New York City Housing Authority remaining after distribution of the monies paid to the underpaid workers referred to by paragraph 2, herein.

A
THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within forty (40) days of the date of issuance of the administrative law judge's decision. See 20 C.F.R. § 6.34. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. See 29 C.F.R. § 6.34. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issue an order affirming the decision. See 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. See 29 C.F.R. § 6.34.